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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JOSE MANUEL ORENDAYN, Defendant and Appellant.	G039398 (Super. Ct. No. 05CF1548) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Craig E. Robison, Judge. Affirmed.

Nancy J. King, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Assistant Attorney General, Rhonda Cartwright-Ladendorf and Kristen Kinnaird Chenelia, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

The trial court sentenced defendant Jose Manuel Orendayn to a 15-years-to-life prison term after a jury found him guilty of kidnapping to commit rape and aggravated sexual assault of a child. He claims the trial court erred by admitting a videotape and transcript of his interrogation without redacting certain comments by the police officers questioning him, and by reading CALCRIM No. 330 to the jury. In addition, defendant argues the prosecutor committed misconduct during closing and rebuttal argument. Finding no prejudicial error, we affirm the judgment.

FACTS

Defendant, Angela C., his putative wife, and their children, traveled to Orange County for a family reunion hosted by Octavio and Ana C. Ana is Angela's sister and the mother of then 10-year-old M.G. Around 6:00 p.m., defendant left Octavio and Ana's home, went to a nearby motel, and rented room number 224 for the night.

Sometime thereafter, M.G. and the other children went outside to play. Defendant returned to Octavio and Ana's home, stayed outside for several minutes, and then left again.

Later, the children, who had been playing a game of hide-and-seek, told Ana that they could not find M.G. Ana and Angela began searching for her. Angela called defendant on his cell phone, telling him M.G. was missing. Defendant said he would return shortly and help look for her.

After about 45 minutes, M.G. called her home using a woman's cell phone. With a neighbor's assistance, Angela brought M.G. home. M.G. had blood stains on her blouse. She told Angela that she got lost, had been followed, and fell down.

When she arrived home, M.G. was crying. Ana and Angela took her into a bathroom and asked her where she had been. At first, M.G. said she had fallen down. Ana checked M.G.'s clothing and found blood in her underwear. M.G. initially did not

answer when Ana asked her what happened. She then said "a bald cholo guy" that she did not know had taken her to a dark street. Concerned about her immigration status and not wanting anyone to learn what happened, Ana did not report the incident to the authorities and threw away M.G.'s clothing.

The next week, M.G. told her teacher two men had taken her to a hotel and touched her inappropriately. The teacher reported the matter. M.G. told a police officer that while playing hide and seek, a white male she had never seen before grabbed her and walked her to a motel room, where he raped her. When the man got off of her, she ran out of the room. M.G. identified the motel where defendant had rented a room as the location of the assault.

A social worker with the county's child abuse services team interviewed M.G. again. This time she described the man who grabbed her as tall, bald, a little chubby, with green eyes and wearing an earring.

A nurse practitioner who physically examined M.G. testified she observed obvious trauma to M.G.'s hymen, including redness, two lesions with discharge, and bruising. The nurse practitioner opined that if the assault had occurred on the previous weekend, there would have been pain and bleeding.

The next day, M.G. spoke with another social worker and, for the first time, identified defendant as the person who sexually assaulted her. M.G. claimed she had not identified him previously because she was afraid her father would give her a beating.

After further questioning, M.G. led the police to room 224 of the motel and identified it as the place where the assault occurred. Subsequent forensic investigation discovered a blood stain on the room's carpet with DNA matching that of M.G.

At trial, M.G. testified that, while hiding in some bushes during the game of hide-and-seek, defendant, without saying a word, grabbed her by the hand, pulled her into his car, and drove her to the motel. He took M.G. to room 224, pushed her onto the bed, removed both her clothes and his clothes, and raped her. After defendant finished, he

went to use the sink. M.G. got up and began dressing herself. She noticed that she was bleeding from her vagina.

The two returned to defendant's car. On the return trip, defendant answered a call on his cell phone, covering her mouth while doing so. M.G. testified she could hear Angela's voice on the phone, inquiring whether defendant had seen her. Defendant then dropped off M.G. by an alley, telling her not to say anything to her parents. M.G. encountered a woman who let her use a cell phone to call home. M.G. admitted lying to both Angela and her mother because she was afraid.

DISCUSSION

1. Refusal to Redact the Videotape of Defendant's Interrogation

a. Background

The police arrested defendant approximately two weeks after the assault. Sergeant Jeffrey Smith interrogated him with the assistance of another police officer who acted as a Spanish translator and participated in the questioning. The interrogation was videotaped and a transcript of it was prepared.

During the interrogation, defendant admitted coming to Orange County, visiting Octavio and Ana's home, and renting room 224 at the hotel. He also admitted problems existed in his relationship with Angela, largely due to his drug use. But he repeatedly denied kidnapping or sexually assaulting M.G. However, defendant displayed a variety of emotions before and during the interrogation, ranging from crying, to being relaxed, to laughing. At some points, defendant also made statements that could be viewed as incriminating admissions.

Before trial, defendant moved to exclude the interrogation, citing *Miranda v. Arizona* (1966) 384 U.S. 436 [86 S.Ct. 1602, 16 L.Ed.2d 694]. The court agreed to exclude the latter portion of the interrogation where defendant asked for an attorney.

The defense also moved to exclude the other portions of the videotaped interrogation under Evidence Code section 352: (1) Smith's statement accusing defendant of "not being honest with me"; (2) his assertion "I know that you guys had sex together" and "how you guys did it," plus his summary of what he claimed defendant did with M.G. as a preface to "[m]y only question to you is why"; (3) Smith's queries "do you think that M[.G.] and Ana and Angela and Octavio are lying[,]" and "how can you possibly refute the evidence that I told you that we have against you[]"; (4) his comment "[y]ou're gonna be looking pretty silly in court when all this information from all these different people and this physical evidence and your simply saying, 'I don't know, it didn't happen, I wasn't there[]'"; and (5) Smith's statement calling defendant "one cold son of a bitch." The court declined to exclude these portions of the interrogation, finding them to be "common tactics" of police interrogations and defense counsel "can develop that these are interview tactics" through cross-examination and argument.

b. Analysis

Defendant contends "statements made during [his] interrogation embrace a multitude of facts, . . . including opinions on [his] guilt and comments buttressing the veracity of other witnesses," for which "[t]here was no [valid] theory of admissibility . . . ." He claims the admission of these portions of the interrogation's videotape violated both state law and his constitutional right to due process of law.

"In general, an accusatory statement and the defendant's response thereto may be received where the truth of the accusation was admitted or where, under circumstances calling for a denial, there w[ere] . . . equivocal or evasive answers indicating a consciousness of guilt or acquiescence in the truth of the statement. [Citations.] Such evidence is not admissible where the defendant has made a flat denial [citation], but if a denial is coupled with other conduct of the accused which is of evidentiary importance, such as where false and evasive replies are made together with a

denial, the evidence may be received [citations]." (*People v. Whitehorn* (1963) 60 Cal.2d 256, 262; see also *People v. Tolbert* (1969) 70 Cal.2d 790, 805.) "'Once a suspect has been properly advised of his rights, . . . [q]uestioning may include exchanges of information, summaries of evidence, outline of theories of events, confrontation with contradictory facts, even debate between police and suspect.'" (*People v. Holloway* (2004) 33 Cal.4th 96, 115.)

However, in *People v. Sanders* (1977) 75 Cal.App.3d 501, the court acknowledged the foregoing rule is subject to limitation. There, the defendant was prosecuted for murder on the theory she hired others to kill the victim. When interrogated by the police, the defendant denied wanting the victim killed or soliciting it, but did make statements implicating her involvement in the murder. At trial, the jury was allowed to listen to a tape recording of the entire interrogation.

The Court of Appeal agreed with the defense claim that the tape recording and transcript of the interrogation should have been edited. "The transcript of the interrogation . . . consists in substantial part of narrative statements by Officer Reynolds which embraced a multitude of facts and were not even in question form. . . . The vice of permitting these statements to go to the jury is twofold. First, the procedure enabled the People to restate their case, largely in the form of double hearsay: Officer Reynolds' extrajudicial statements concerning information he had received from others. Second, the procedure enabled the People to rehabilitate some of their badly impeached witnesses in impermissible fashion. . . . [¶] The People argue that the officer's narrative statements were admissible as adoptive admissions (Evid. Code, § 1221). We disagree. It is fundamentally unfair to expect point-by-point denials of long narrative statements, containing several facts as well as theories and inferences—particularly where the statements are not in question form." (*People v. Sanders, supra,* 75 Cal.App.3d at pp. 507-508, fns. omitted.)

This case is distinguishable from *Sanders* because the videotape also depicted defendant's emotional reactions to the charges and evidence against him. (*People v. Cain* (1995) 10 Cal.4th 1, 33 [videotape of defendant's allegedly false statements admissible where his "demeanor when making . . . these statements is highly probative"].) In addition, the defense cross-examined Smith about his interrogation techniques, getting him to admit he lied to defendant when he claimed the police had already questioned his family or found M.G.'s blood in the motel room.

But even assuming the trial court erred by declining to redact portions of the videotape of defendant's interrogation, the error was harmless. Insofar as any error violated state evidentiary law, the test is "whether it is reasonably probable the verdict would have been more favorable to the defendant absent the error. [Citations.]" (*People v. Partida* (2005) 37 Cal.4th 428, 439; see also *People v. Watson* (1956) 46 Cal.2d 818, 836.) No reasonable probability of a different result exists in this case. Smith was cross-examined on his interrogation techniques, including the fact many of the factual statements he asserted were knowingly false. Furthermore, his efforts were largely unsuccessful. Throughout the interrogation, defendant consistently denied either kidnapping or sexually assaulting M.G.

In addition, the circumstantial evidence overwhelmingly supported defendant's conviction. M.G. disclosed facts she could not have known had she not been with defendant. She identified both the motel and the room defendant had rented as the location of the sexual assault. She also testified to overhearing Angela's cell phone call to defendant reporting her disappearance. Ana and Angela testified about the discovery of blood on M.G. upon her return home. The medical examination performed on M.G. a few days later confirmed she had been the victim of a sexual assault of such severity that it would have caused vaginal bleeding. Finally, forensic investigation discovered a drop of M.G.'s blood in the motel room defendant rented.

Defendant contends the admission of the unredacted videotape also violated his constitutional right to due process of law. The Attorney General argues defendant forfeited this claim by not asserting it at trial. (Evid. Code, § 353.) But since defendant's due process argument is based on the same ground as his timely Evidence Code section 352 objection, "[h]e may argue that the asserted error in admitting the evidence over his . . . objection had the additional legal consequence of violating due process." (*People v. Partida, supra*, 37 Cal.4th at p. 435.) "The admission of relevant evidence will not offend due process unless the evidence is so prejudicial as to render the defendant's trial fundamentally unfair. [Citations.]" (*People v. Falsetta* (1999) 21 Cal.4th 903, 913; accord *People v. Jablonski* (2006) 37 Cal.4th 774, 805.) Given the foregoing analysis no fundamental unfairness occurred in this case.

2. CALCRIM No. 330

a. Background

Along with other instructions on witness credibility, the court read CALCRIM No. 330 to the jury concerning the testimony of a child witness: "You have heard evidence from a child who is age ten or younger. As with any other witness you must decide whether the child gave truthful and accurate testimony. [¶] In evaluating the child's testimony, you should consider all the factors surrounding the testimony including the child's age and level of cognitive development. [¶] When you evaluate the child's cognitive development, consider the child's ability to perceive, understand, remember and communicate. [¶] . . . While a child and an adult witness may behave differently, that difference does not mean that one is any more or less believable than the other. You should not discount or distrust the testimony of a witness just because he or she is a child."

Defendant now contends the trial court erred in giving CALCRIM No. 330 because M.G. was 12 years old at the time of trial and use of the instruction violated his constitutional rights by "unfairly bolster[ing M.G.'s] credibility."

b. Analysis

CALCRIM No. 330 is based on Penal Code section 1127f, which declares, "the court shall instruct the jury" as provided "[i]n any criminal trial or proceeding in which a child 10 years of age or younger testifies as a witness . . . ." Contrary to the Attorney General, it is now "established . . . that . . . appellate review" of "instruction[s] affecting the substantial rights of the accused" is permitted "even in the absence of an objection . . . ." (*People v. McCoy* (2005) 133 Cal.App.4th 974, 978; see also Pen. Code, § 1259.) In addition, the Supreme Court has held "[a]bsent a request, . . . the trial court is not required to give either the statutory instruction or some other form of cautionary instruction. [Citation.]" (*People v. Cudjo* (1993) 6 Cal.4th 585, 624.) Nonetheless, we conclude no prejudicial error occurred in this case.

In *People v. Jones* (1990) 51 Cal.3d 294, the Supreme Court noted the Legislature's enactment of section 1127f reflects it had "adopted the modern view regarding the credibility of child witnesses . . . ." (*People v. Jones, supra,* 51 Cal.3d at p. 315.) "The insistence of some cases on greater specificity of a child victim's testimony may reflect persistent doubts about the general credibility of that testimony. [Citations.] . . . . [¶] Recent studies have undermined traditional notions regarding the unreliability of child witnesses, their untruthfulness, susceptibility to leading questions, or inability to recall prior events accurately. 'Empirical studies have produced results indicating that most of these traditional assumptions are completely unfounded.' [Citations.]" (*Ibid*.)

Furthermore, defendant concedes several appellate decisions have rejected his argument with respect to former CALJIC No. 2.20.1, the predecessor to CALCRIM

No. 330. (*People v. McCoy, supra,* 133 Cal.App.4th at pp. 978-980; *People v. Jones* (1992) 10 Cal.App.4th 1566, 1572-1574; *People v. Gilbert* (1992) 5 Cal.App.4th 1372, 1393; *People v. Harlan* (1990) 222 Cal.App.3d 439, 455-457.) In fact, *McCoy* also rejected the implication that CALCRIM No. 330 is invalid. (*People v. McCoy, supra,* 133 Cal.App.4th at p. 980.)

We agree with the conclusion of the foregoing cases. As explained in *Gilbert*: "The instruction tells the jury not to make its credibility determinations solely on the basis of the child's 'age and level of cognitive development,' but at the same time invites the jury to take these and all other factors surrounding the child's testimony into account. The instruction provides sound and rational guidance to the jury in assessing the credibility of a class of witnesses as to whom '"traditional assumptions"' may previously have biased the factfinding process. Obviously a criminal defendant is entitled to fairness, but just as obviously he or she cannot complain of an instruction the necessary effect of which is to increase the likelihood of a fair result. There was no denial of due process." (*People v. Gilbert*, *supra*, 5 Cal.App.4th at p. 1393.)

The foregoing notwithstanding, it is conceded M.G. was 12 years old at the time of trial. Arguably, the instruction may have been intended to apply to the taped transcripts of her statements to the police and social workers shortly after the sexual assault when M.G. was 10. But the trial transcript reflects the court and parties discussed the jury instructions during an informal chambers conference that was not recorded, and neither party cites to any discussion as to the applicability of CALCRIM No. 330 or to possibly modifying it in light of M.G.'s current age.

"[I]nstruction on a legal point should be refused if there is no evidence to which the instruction may be properly related. [Citations.] 'It has long been the law that it is error to charge the jury on abstract principles of law not pertinent to the issues in the case. [Citation.] The reason for the rule is obvious. Such an instruction tends to confuse and mislead the jury by injecting into the case matters which the undisputed evidence

shows are not involved.' [Citation.]" (*People v. Robinson* (1999) 72 Cal.App.4th 421, 428.)

Nonetheless, giving CALCRIM No. 330 did not prejudice defendant. Under state law "[i]t is settled that this type of instructional error does not require reversal unless it is affirmatively shown that defendant was prejudiced thereby and that there is a reasonable probability that, absent the error, the jury would have returned a verdict more favorable to the defendant. [Citations.]" (*People v. Robinson, supra,* 72 Cal.App.4th at p. 429.) Where a defendant claims the giving of an ambiguous or potentially misleading instruction violated his federal constitutional rights, we review the instructions as a whole and determine "'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution. [Citation.]" (*Estelle v. McGuire* (1991) 502 U.S. 62, 72 [112 S.Ct. 475, 116 L.Ed.2d 385], fn. omitted; see also *People v. Young* (2005) 34 Cal.4th 1149, 1202.)

As discussed above, CALCRIM No. 330 is not an invalid instruction in cases where the credibility of a child witness is at issue. Contrary to defendant the instruction did not operate bolster M.G.'s credibility. Nor is there any indication the jury misapplied this instruction in this case. Therefore, giving CALCRIM No. 330 was not prejudicial error.

3. Prosecutorial Misconduct

a. Background

Finally, defendant claims the deputy district attorney committed misconduct during closing and rebuttal argument.

While discussing the elements of the crime of rape, the prosecutor stated as follows: "Basically rape is just if you have intercourse with a woman, and it's forced. It is not difficult. What is sexual intercourse? You don't have to decide. . . . [¶] All you have to know is it's any penetration no matter how slight of the vagina by the penis. It

doesn't matter how long. I don't have to prove to you he ejaculated. That's not an element. He just has to have touched her vagina with a penis. And that's it. And no consent." Defense counsel objected, claiming this was "a misstatement of the law." The court referred the jury to the instructions and noted "if counsel's arguments are different than what you have been instructed, you're to follow my instructions."

At a later point in closing argument, the prosecutor discussed the testimony of Angela: "Now, Angela . . . [l]et's talk about her [testimony] for a minute . . . . I would submit to you . . . as she stated on the witness stand, it's very hard [for her to believe] . . . the fact that [her] husband did something like this. . . . [¶] . . . So I'm sure as she sat here and testified, she doesn't want to believe that he's capable of doing this . . . . [¶] Now, maybe she thinks that if they were fighting on the day, that somehow is perceived as bad. Angela doesn't know what the evidence in this case is. I don't . . . share evidence with witnesses . . . . [¶] She does not know what the evidence is in this case against the defendant. All she knows is in her mind maybe what's bad and what's good. . . . So her testimony about the phone calls and that kind of stuff, . . . I think that's great evidence." Defense counsel objected to this statement "as personal comment on the evidence, personal validation." The court sustained the objection.

During rebuttal, the prosecutor commented "[t]he saddest part about this whole case is [M.G.] is trying to protect everyone. . . . Who is protecting [M.G.]?" Defense counsel objected to this statement as an "[i]njection of feeling and sympathy." The court instructed the jury "it is not your job to protect anybody. It's your job to decide the facts and render a verdict without regard to appeals to your emotions."

At the end of rebuttal, the prosecutor argued as follows: "Look at the evidence in this case. Even if you subtract out [M.G.'s] testimony, you still have him. You still have her being raped by her injuries in his motel room. Her blood in his motel room. [¶] He still hasn't given a reasonable explanation for how she got raped in his motel room." Defense counsel objected, claiming this argument "[s]hifts the burden of

proof." The trial court sustained the objection. The prosecutor then responded: "Ladies and gentlemen, make no mistake, it's my burden to prove this case to you. But when [defense counsel] says it's possible someone else raped her in that motel room, I'm telling you that's not reasonable. And from the evidence you heard in this case, it's not even possible."

b. Analysis

"The standards under which we evaluate prosecutorial misconduct may be summarized as follows. A prosecutor's conduct violates the Fourteenth Amendment to the federal Constitution when it infects the trial with such unfairness as to make the conviction a denial of due process. Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the trial court or the jury. Furthermore, and particularly pertinent here, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Morales* (2001) 25 Cal.4th 34, 44.)

"'While counsel is accorded "great latitude at argument to urge whatever conclusions counsel believes can properly be drawn from the evidence," counsel may not assume or state facts not in evidence [citation] or mischaracterize the evidence.' [Citation.] Whether the inferences drawn by the prosecutor are reasonable is a question for the jury. [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 181.)

With respect to the prosecutor's alleged misstatement of the law concerning rape, while it may be conceded "the prosecutor's arguments were less than ideal," "[v]iewed in context, we find no reasonable likelihood that the prosecutor's arguments misled the jury in an objectionable fashion—i.e., so as to improperly convict

him . . . ." (*People v. Morales*, *supra*, 25 Cal.4th at p. 47.) The introductory portion of the prosecutor's argument correctly defined the offense. It is only the last portion of it that is questionable. But defendant timely objected and the trial judge told the jury to rely on its instructions, not counsel's arguments. Furthermore, the question of whether M.G. was raped was not seriously in dispute at trial. The defense was that the police, Ana, and Angela convinced M.G. to falsely identify him as the rapist. He did not dispute that a rape occurred or claim he attempted to rape M.G., but failed to accomplish the act.

Next, defendant claims the prosecutor improperly vouched for Angela's testimony by describing it as "great evidence." Standing alone, the "great evidence" statement would not constitute misconduct. (*People v. Price* (1991) 1 Cal.4th 324, 461-462.) "A prosecutor may make 'assurances regarding the apparent honesty or reliability of' a witness 'based on the "facts of [the] record and the inferences reasonably drawn therefrom."' [Citation.]" (*People v. Turner* (2004) 34 Cal.4th 406, 432.) But the prosecutor also referred to her practices concerning witness preparation. This statement crossed the line between proper assurances based on the record and improper vouching. "[A] 'prosecutor is prohibited from vouching for the credibility of witnesses or otherwise bolstering the veracity of their testimony by referring to evidence outside the record.' [Citation.]" (*People v. Turner*, *supra*, 34 Cal.4th at pp. 432-433.)

We conclude the improper vouching was not prejudicial because "'"there is [no] reasonable possibility that the jury construed or applied the prosecutor's comment[] in an objectionable manner."' [Citation.]" (*People v. Guerra* (2006) 37 Cal.4th 1067, 1153.) The statement was brief and not critical to the prosecution's theory of the case. (*People v. Parson* (2008) 44 Cal.4th 332, 360-361.) The trial court sustained defendant's objection to the statement. In addition, the court properly instructed the jury on witness credibility and that the statements of counsel were not evidence. We presume the jury followed the court's instructions. (See *People v. Valdez* (2004) 32 Cal.4th 73, 134.)

Next, defendant cites the prosecutor's query during rebuttal, asking

"Who is protecting [M.G.]?" as an act of misconduct. "It is 'settled that an appeal to the jury to view the crime through the eyes of the victim is misconduct at the guilt phase of trial; an appeal for sympathy for the victim is out of place during an objective determination of guilt. [Citations.]' [Citation.]" (*People v. Arias* (1996) 13 Cal.4th 92, 160.) But here, the trial court immediately admonished the jury its duty was "to decide the facts and render a verdict without regard to appeals to your emotions," rather than "to protect anybody." This admonishment sufficed to cure any error. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1060; *In re Brian J.* (2007) 150 Cal.App.4th 97, 123.)

Finally, defendant claims the prosecutor's concluding comment of no "reasonable explanation" by the defense about "how [M.G.] got raped in his motel room," violated his rights by misleading the jury on the state's burden of proof. We conclude the comment was proper. Nothing in the prosecutor's statement suggested defendant had any burden to prove his innocence. "A distinction clearly exists between the permissible comment that a defendant has not produced any evidence, and on the other hand an improper statement that a defendant has a duty or burden to produce evidence, or a duty or burden to prove his or her innocence." (*People v. Bradford* (1997) 15 Cal.4th 1229, 1340.) Thus, in *Bradford* the Supreme Court concluded "brief comments by the prosecution during closing argument noting the absence of evidence contradicting what was produced by the prosecution on several points" did not "impermissibly shift the burden of proof to defendant." (*Id.* at pp. 1339-1340.)

Courts have held "it is error for a prosecutor to state that certain evidence is uncontradicted or unrefuted when that evidence could not be contradicted or refuted by anyone other than the defendant testifying on his or her own behalf. [Citations.]" (*People v. Hughes* (2002) 27 Cal.4th 287, 371.) But this rule "does not . . . extend to bar prosecution comments based upon the state of the evidence or upon the failure of the defense to introduce material evidence or to call anticipated witnesses. [Citations.]" (*People v. Bradford, supra,* 15 Cal.4th at p. 1339; see also *People v. Bethea* (1971) 18

Cal.App.3d 930, 936 [prosecutor's comment, "The state of the record is that there has been no explanation given for this," not error because it "go[es] to the state of the evidence, which is entirely proper" and did not refer to the defendant's failure to testify].) In addition, after the court sustained defense counsel's objection, the prosecutor acknowledged it was her "burden to prove this case to you."

The acts amounting to misconduct were brief and, in light of the evidence and disputed issues, not such as to infect the trial with unfairness or sufficient to constitute improper persuasion. Thus, we reject defendant's claim these acts support a reversal of his conviction.

DISPOSITION

The judgment is affirmed.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

O'LEARY, J.

MOORE, J.